No. 88-1943

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Office of Personnel Management can be equitably estopped from applying the requirements of 5 U.S.C. 8337(d) (1988), which mandate discontinuance of a disability annuity when the annuitant's earned income exceeds the maximum amount allowed under the statute.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Summary of argument	7
Argument:	
I. The government cannot be estopped from enforcing the law by the misrepresentations of Executive Branch officials	11
A. Congress has not consented to the application of estoppel against the government	12
B. To estop the government from enforcing the laws would violate constitutional principles of separation of powers	20
C. The application of estoppel against the government would not be in the public interest	34
II. The presence of "affirmative misconduct" does not affect this analysis	37
A. The presence of egregious misconduct, in and of itself, does not direct the application of estoppel as a remedy	37
B. The misconduct of government officials is relevant only when that misconduct would render subsequent enforcement of a statute unconstitutional or inapplicable by its own terms	39
C. The negligent conduct that occurred in this case does not affect either constitutional or statutory rights	43
III. Even if the government may be estopped under some standard of affirmative misconduct, no estoppel is warranted here	44

Argument—Continued: Page

A. Since respondent is charged with knowledge of the law, his reliance on erroneous advice was not reasonable 44

B. There was no such affirmative misconduct here as would suffice to estop the government 46

Conclusion 47

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Automobile Club v. *Commissioner*, 353 U.S. 180 (1957) 11, 16, 20, 22, 42
Block v. *North Dakota*, 461 U.S. 273 (1983) 13, 34
Boulez v. *Commissioner*, 810 F.2d 209 (D.C. Cir.), cert. denied, 484 U.S. 896 (1987) 45
Bowen v. *Massachusetts*, 108 S. Ct. 2722 (1988) 17
Burt v. *United States*, 199 Ct. Cl. 897 (1972) 34
Canada and Dominion Sugar Co., Ld. v. *Canadian Nat. (West Indies) Steamships, Ld.*, [1947] App. Cas. 46 (H.L. (Can.) 1946) 14-15
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 14
Crown v. *United States Railroad Retirement Board*, 811 F.2d 1017 (7th Cir. 1987) 23, 45
Cox v. *Louisiana*, 379 U.S. 559 (1965) 39, 40
Dalehite v. *United States*, 346 U.S. 15 (1953) 33
Daniels v. *Williams*, 474 U.S. 327 (1986) 10, 43
Davidson v. *Cannon*, 474 U.S. 344 (1986) 43
Dixon v. *United States*, 381 U.S. 68 (1965) 16, 20, 34
Dorl v. *Commissioner*, 507 F.2d 406 (2d Cir. 1974) 23
Dox v. *Postmaster General of the United States*, 26 U.S. (1 Pet.) 318 (1828) 14
Doyle v. *Ohio*, 426 U.S. 610 (1976) 41
Emery Mining Corp. v. *Secretary of Labor*, 744 F.2d 1411 (10th Cir. 1984) 45

Cases—Continued: Page

Falcone v. *Pierce*, 864 F.2d 226 (1st Cir. 1988) 45
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) ..... *passim*
Filor v. *United States*, 76 U.S. (9 Wall.) 45 (1869) 11, 21, 29
Floyd Acceptances, The, 74 U.S. (7 Wall.) 666 (1868) 11, 20, 21, 35, 43
Gibbons v. *United States*, 75 U.S. (8 Wall.) 269 (1868) 11, 29-30
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 29, 33
Guaranty Trust Co. v. *United States*, 304 U.S. 126 (1938) 15
Hansen v. *Harris*, 619 F.2d 942 (2d Cir. 1980), rev'd *sub nom. Schweiker* v. *Hansen*, 450 U.S. 785 (1981) 21-22
Hart v. *United States*, 95 U.S. 316 (1877) 11, 36, 43
Hawkins v. *United States*, 96 U.S. 689 (1877) 11, 29
Heckler v. *Community Health Services*, 467 U.S. 51 (1984) ..... *passim*
Heckler v. *Matthews*, 465 U.S. 728 (1984) 26
Hedges v. *Dixon County*, 150 U.S. 182 (1893) 14
INS v. *Chadha*, 462 U.S. 919 (1983) 34
INS v. *Hibi*, 414 U.S. 5 (1973) 11, 22, 37, 42
INS v. *Miranda*, 459 U.S. 14 (1982) 11, 37, 42
INS v. *Pangilinan*, 108 S. Ct. 2210 (1988) 9, 14, 16, 26, 28, 40
Johnson v. *United States*, 318 U.S. 189 (1943) 40
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 17, 18, 19
Larson, In re, 862 F.2d 112 (7th Cir. 1988) 45
Lee v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813) 7, 11, 23, 27, 35, 36
Lee You Fee v. *Dulles*, 236 F.2d 885 (7th Cir. 1956), rev'd, 355 U.S. 61 (1957) 41
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 13
Lindahl v. *OPM*, 470 U.S. 768 (1985) 16
Merchants Nat'l Bank v. *United States*, 5 Cl. Ct. 180 (1984) 33, 34
Minnesota v. *United States*, 305 U.S. 382 (1939) 20
Mistretta v. *United States*, 109 S. Ct. 647 (1989) 20

Cases—Continued: Page

Montana v. *Kennedy*, 366 U.S. 308 (1961) 11, 37, 41, 46, 47
Moser v. *United States*, 341 U.S. 41 (1951) 39, 40, 41
National Railroad Passenger Corp. v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974) 26
Nichols v. *United States*, 74 U.S. (7 Wall.) 122 (1868) 19
Pine River Logging Co. v. *United States*, 186 U.S. 279 (1902) 11, 19, 21, 28, 36, 42
Podea v. *Acheson*, 179 F.2d 306 (2d Cir. 1950) 41
Portmann v. *United States*, 674 F.2d 1155 (7th Cir. 1982) 45
Raley v. *Ohio*, 360 U.S. 423 (1959) 39, 40, 41
Reamer v. *United States*, 459 F.2d 709 (4th Cir. 1972) 18
Reeside v. *Walker*, 52 U.S. (11 How.) 271 (1850) .. 21
Schweiker v. *Hansen*, 450 U.S. 785 (1981) ..... *passim*
Scime v. *Bowen*, 822 F.2d 7 (2d Cir. 1987) 23, 47
Snyder v. *Buck*, 340 U.S. 15 (1950) 20
Soriano v. *United States*, 352 U.S. 270 (1957) 13
Sorrells v. *United States*, 287 U.S. 435 (1932) 26
Sutton v. *United States*, 256 U.S. 575 (1921) 11, 21, 30, 43
United States v. *Browning*, 630 F.2d 694 (10th Cir. 1980) 45
United States v. *Caceres*, 440 U.S. 741 (1979) 36
United States v. *Hoar*, 26 F. Cas. 329 (C.C.D. Mass. 1821) (No. 15,373) 14, 15
United States v. *Killough*, 848 F.2d 1523 (11th Cir. 1988) 23
United States v. *Kirkpatrick*, 22 U.S. 9 (Wheat.) 720 (1824) 14, 35
United States v. *Mitchell*, 445 U.S. 535 (1980) .. 12, 13, 16
United States v. *Mottaz*, 476 U.S. 834 (1986) 13
United States v. *Neustadt*, 366 U.S. 696 (1961) 17, 18
United States v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973) 39, 40, 43
United States v. *Realty Co.*, 163 U.S. 427 (1896) .. 26, 28, 29

Cases—Continued: Page

United States v. *Russell*, 411 U.S. 423 (1973) 26
United States v. *San Francisco*, 310 U.S. 16 (1940) 11, 20, 42
United States v. *Sherwood*, 312 U.S. 584 (1941) .. 13
United States v. *Stewart*, 311 U.S. 60 (1940) 11, 23, 35, 41, 42
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) 13, 20, 37
Utah v. *United States*, 284 U.S. 534 (1932) 11, 35
Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 7, 11, 12, 13, 15
Whiteside v. *United States*, 93 U.S. 247 (1876) 11, 21, 36, 43
Wilber Nat'l Bank v. *United States*, 294 U.S. 120 (1935) 11, 30, 43
Wisconsin Central R.R. v. *United States*, 164 U.S. 190 (1896) 11, 20

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 9, Cl. 7 21
Amend. V (Due Process Clause) 40, 43
Act of Mar. 2, 1881, ch. 113, 21 Stat. 636 30
Civil Rights Act of 1964, 42 U.S.C. 2000e-12 (1982) 24
Civil Service Retirement Act of 1930, 5 U.S.C. 8331 *et seq.* 27
5 U.S.C. 8337 (1988) 2, 8, 17
5 U.S.C. 8337(a) 3
5 U.S.C. 8337(d) 3, 4, 6, 22, 23, 32
5 U.S.C. 8337(d) (1976) 3
5 U.S.C. 8337(e) 4
Department of Energy Organization Act, 42 U.S.C. 7193(g) (1982) 24
Employee Retirement Income Security Act, 29 U.S.C. 1028 (1982) 24
Federal Election Campaign Act, 2 U.S.C. 431 *et seq.* (1988):
2 U.S.C. 437f(c) 24
2 U.S.C. 438(e) 24

Statutes and regulations—Continued: Page

Federal Trade Commission Act, 15 U.S.C. 57b-4 (1988) ... 24
Federal Tort Claims Act, ch. 753, 60 Stat. 842 ... 29, 33
28 U.S.C. 1346(b) ... 8, 17
28 U.S.C. 2671 *et seq.* ... 8, 17
28 U.S.C. 2680(h) (1982) ... 18
Indian Claims Commission Act, 25 U.S.C. 70a (1976) ... 16
Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 ... 13
Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763:
§ 302(a), 96 Stat. 792 ... 2
§ 302(a)(1), 96 Stat. 792 ... 22
§ 302(a)(2), 96 Stat. 792 ... 3, 22
Portal-to-Portal Act, 29 U.S.C. 251 *et seq.*:
29 U.S.C. 258-260 (1982) ... 24
29 U.S.C. 259 ... 24
Quiet Title Act, Pub. L. No. 92-562, 86 Stat. 1176 ... 33
Railroad Retirement Act of 1974, 45 U.S.C. 231i(c) (1982) ... 25
Securties Act of 1933, 15 U.S.C. 77s(a) (1982) ... 24
Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 8018, 102 Stat. 3794 ... 24
Tucker Act, ch. 359, § 1, 24 Stat. 505 ... 29, 33
Priv. L. No. 213, ch. 195, 42 Stat. 1784 ... 30
Priv. L. No. 99-3 (June 19, 1986) ... 32
Priv. L. No. 99-14 (Sept. 23, 1986) ... 33
Priv. L. No. 100-25 (Oct. 28, 1988) ... 32
Priv. L. No. 100-26 (Oct. 28, 1988) ... 33
Priv. L. No. 100-33 (Nov. 3, 1988) ... 32
Priv. L. No. 100-37 (Nov. 9, 1988) ... 32
Priv. L. No. 100-47 (Nov. 10, 1988) ... 33
5 U.S.C. 4108 (1988) ... 25
5 U.S.C. 5584 (1988) ... 25
5 U.S.C. 5922(b)(2) (1988) ... 25
5 U.S.C. 7703(a)(1) (1988) ... 8, 16
5 U.S.C. 7703(c) (1988) ... 8, 16

Statutes and regulations—Continued: Page

5 U.S.C. 7703(c)(1) ... 16
5 U.S.C. 8346(b) (1988) ... 25
10 U.S.C. 1442 (1988) ... 25
10 U.S.C. 1453 (1988) ... 25
10 U.S.C. 2774(a) (1988) ... 25
14 U.S.C. 513 (1988) ... 26
19 U.S.C. 1618 (1982) ... 25
28 U.S.C. 1492 (1982) ... 31
28 U.S.C. 2509(c) (1982) ... 31
29 U.S.C. 259 (1982) ... 24
32 U.S.C. 716 (1982) ... 25
38 U.S.C. 3102(a) (1982) ... 25
42 U.S.C. 404(b) (1982) ... 25
42 U.S.C. 1383(b)(1)(B) (Supp. V 1987) ... 25
42 U.S.C. 1395gg(c) (1982) ... 25
44 U.S.C. 1507 (1982) ... 43
45 U.S.C. 352(d) (1982) ... 25
5 C.F.R. 831.502 *et seq.* (1988) ... 4
Section 831.502(e) ... 4
Section 831.1402(b) ... 25
Section 831.1403(a)(2) ... 25
19 C.F.R. 171 App. A (1988) ... 26
20 C.F.R. 404.509-404.510 (1988) ... 25
29 C.F.R. 1613.214(a)(1) (1988) ... 25
29 C.F.R. 1613.214(a)(4) ... 25
38 C.F.R. 1.965(a)(2) (1988) ... 25
38 C.F.R. 1.965(a)(4) ... 25
48 C.F.R. 1.601 (1988) ... 19

Miscellaneous:

Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534 (1947) ... 19
80 Cong. Rec. 10,560 (1936) ... 30
131 Cong. Rec. 9675 (1985) ... 32
Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827 (1957) ... 19
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Miscellaneous—Continued: Page

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H.R. Doc. No. 348, 67th Cong., 2d Sess. (1922) 30
H.R. Rep. No. 34, 76th Cong., 1st Sess. (1939) 30
H.R. Rep. No. 78, 99th Cong., 1st Sess. (1985) 33
H.R. Rep. No. 148, 100th Cong., 1st Sess. (1987) .. 32-33
H.R. Rep. No. 189, 49th Cong., 1st Sess. (1886) 30
H.R. Rep. No. 290, 100th Cong., 1st Sess. (1987) .. 32
H.R. Rep. No. 291, 100th Cong., 1st Sess. (1987) .. 32
H.R. Rep. No. 443, 100th Cong., 1st Sess. (1987) .. 33
H.R. Rep. No. 545, 100th Cong., 2d Sess. (1988) .. 33
H.R. Rep. No. 673, 43d Cong., 1st Sess. (1874) 30
H.R. Rep. No. 886, 46th Cong., 2d Sess. (1880) 30
H.R. Rep. No. 1376, 67th Cong., 4th Sess. (1923) .. 30
H.R. Rep. No. 1435, 74th Cong., 1st Sess. (1935) .. 30
Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551 (1979) 38
Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684 (1966) 31, 32
Note, *Private Bills and the Immigration Law*, 69 Harv. L. Rev. 1083 (1956) 34
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Vol. 2 ..... 14, 26
Vol. 3 ..... 15, 37, 44
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S. Rep. No. 504, 97th Cong., 2d Sess. (1982) 22

Miscellaneous—Continued: Page

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S. Rep. No. 887, 67th Cong., 2d Sess. (1922) 30
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C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1985 & Supp. 1989) 19

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 862 F.2d 294. The decision of the Merit Systems Protection Board's administrative judge (Pet. App. 20a-24a), and the denial of review by the Board (Pet. App. 32a-33a), are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on December 2, 1988. A petition for rehearing was denied on February 3, 1989 (Pet. App. 31a). On April 25, 1989, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 3, 1989. The petition for a writ of certiorari was filed on June 2, 1989, and was granted on October 2, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 8337(d) of Title 5, United States Code, as amended by Pub. L. No. 97-253, § 302(a), 96 Stat. 792, provides:

> If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, recovers from his disability, payment of the annuity terminates on reemployment by the Government or 1 year after the date of the medical examination showing the recovery, whichever is earlier. If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, payment of the annuity terminates on reemployment by the Government or 180 days after the end of the calendar year in which earning capacity is so restored, whichever is earlier. Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

STATEMENT

In this case, the Court of Appeals for the Federal Circuit estopped the Office of Personnel Management (OPM) from applying the terms of 5 U.S.C. 8337(d) (1988).[1] Under the terms of that provision, a disability annuitant who earns more than a certain statutory limit on income in any one year is deemed restored to "[e]arning capacity," and therefore loses his or her disability annuity. In 1986, OPM discontinued respondent's annuity because he had earned more than the statutory limit. The court of appeals, however, ordered the withheld payments to be released because two Navy employees had incorrectly told respondent that his disability annuity would not be

[1] Unless otherwise noted, all references to Section 8337 of Title 5 are to the 1988 edition of the United States Code.

discontinued unless he earned more than the statutory limit during *two* consecutive years, and had also furnished respondent a circular reflecting the incorrect information. The court ruled that this behavior constituted sufficient "affirmative misconduct" to warrant an exception to the general rule that the government may not be estopped from enforcing the laws.

1. Congress has provided that federal employees who complete at least five years of service and become disabled may retire and receive a disability annuity. 5 U.S.C. 8337(a). If an annuitant under 60 years of age recovers from his or her disability, or is "restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement," the annuity terminates. 5 U.S.C. 8337(d).

An individual is deemed "restored to * * * earning capacity" if his wages for a given period of time exceed a specified statutory cap. Prior to 1982, the statute provided that an individual retired for disability was deemed "restored to * * * earning capacity," and thus no longer eligible for a disability annuity, if:

> *in each of 2 succeeding calendar years* the income of the annuitant from wages or self-employment * * * equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. 8337(d) (1976) (emphasis added).

The provision was amended in 1982 by the Omnibus Budget Reconciliation Act, Pub. L. No. 97-253, § 302(a)(2), 96 Stat. 792, to provide that if the statutory cap on earnings is exceeded in any one year, the annuity is to be terminated:

> Earning capacity is deemed restored if *in any calendar year* the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

5 U.S.C. 8337(d) (emphasis added).

Under Title 5, the disability annuity terminates 180 days after the end of the calendar year in which earning capacity is restored. 5 U.S.C. 8337(d). However, an annuitant who has not recovered from the disability for which he was retired may have his annuity restored "effective the first of the year following any calendar year in which his income from wages or self-employment or both is less than [the statutory limit]." 5 U.S.C. 8337(e).[2]

2. Respondent retired from his position as a welder with the Navy in 1981, after OPM had approved his application for disability retirement. In January 1986, respondent asked a Navy Employee Relations Specialist at the Navy Public Works Center in San Diego, California, for information about how much he could earn without exceeding the statutory limit. The Specialist erroneously told Richmond about the provisions of the pre-1982 version of Section 8337(d)—that his annuity would not be discontinued unless, in each of two succeeding years, he earned at least 80 percent of the current rate of pay for the position he held prior to retirement. Pet. App. 2a. The Specialist also gave respondent a copy of Attachment 4 to Federal Personnel Manual Letter 831-64 (1981), a publication of the Office of Personnal Management that, while correct when written, was no longer accurate.[3] It too explained the two-year rule of the pre-1982 statute. Pet. App. 2a & n.4. In January 1987, respondent again went to the Navy seeking advice on earnings. Another Employee Relations Specialist erroneously advised him of the two-year rule. Gov't C.A. App. 4-5; Pet. App. 10a-11a.

[2] The statutory requirements have been codified in regulations issued by OPM. See 5 C.F.R. 831.502 *et seq.* (1988). Under the regulations, disability annuitants under 60 years of age must annually report income from wages and/or self-employment during the previous calendar year, or forfeit the annuity. 5 C.F.R. 831.502(e) (1988).

[3] This attachment is reproduced in the appendix to this brief.

3. According to respondent, from 1982 through 1986, he earned an average of $12,494 per year by working as a school bus driver. See Pet. App. 21a. After receiving the erroneous information from the Navy and the OPM circular, respondent, in the year 1986, earned $19,936—more than the amount permitted by statute.[4] *Ibid.* As a result, OPM discontinued his annuity as of June 30, 1987. Pet. App. 25a-29a. However, because respondent earned less than the statutory cap on earnings in 1987, his disability annuity was restored as of January 1, 1988. Respondent, therefore, was without his annuity payments for a period of six months. Pet. App. 1a n.1.[5]

Respondent sought review of the OPM decision by the Merit Systems Protection Board (MSPB). He contended that OPM was equitably estopped from discontinuing his annuity payments because he had received misinformation from Federal Personnel Manual Letter 831-64, the circular given him by the Navy. An MSPB administrative judge rejected the estoppel claim, holding that "OPM cannot be estopped from enforcing a statutorily imposed requirement for retirement eligibility." Pet. App. 22a. In addition, the administrative judge found that respondent had demonstrated by virtue of his income that he had been restored to earning capacity in 1986 and "that he was not entitled to a continuation of that retirement annuity for that year." *Ibid.*

The MSPB denied respondent's petition for review (Pet. App. 32a-33a), and he sought review in the Federal Circuit.

[4] In order to continue to receive his disability annuity, respondent was required to earn less than $19,016.74 (80 percent of the base salary ($23,771) for a WG-10, Step 4 welder as of December 31, 1986). Pet. App. 21a.

[5] We have been informed by the Office of Personnel Management that the total amount of disability annuity withheld from respondent during the six months he was ineligible to receive it was $3,993.00.

4. A divided panel of the Federal Circuit reversed. It acknowledged as a "long-established rule" the traditional reluctance of courts to apply estoppel against the government. But in its view, this Court's decision in *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), indicated that the government may be estopped upon a finding that the traditional elements of estoppel are present and that the government has engaged in "affirmative misconduct." Pet. App. 4a-10a. Applying this approach, the court first found the traditional elements of estoppel: it concluded that the government knew the facts; that the government gave misinformation to respondent with the intent that he rely on it; and that the respondent, in good faith, did reasonably rely on it to his detriment. Pet. App. 9a. Second, the court ruled that the government had engaged in "affirmative misconduct" sufficient to estop it from applying Section 8337(d) to deny respondent his annuity (Pet. App. 9a-10a):

> [W]e conclude that the government's action in providing [respondent] with an OPM letter which summarized a law which had been changed some 4 years earlier is sufficient "misconduct" for estoppel to apply. To provide such a letter to an individual who apparently made specific requests for current written information through what appeared to be the correct channels is reckless, at the very least. That it was "affirmative" conduct cannot be disputed.

The court then rejected the argument that the estoppel could not be used to award benefits to one ineligible for them, holding that where an individual would have been eligible "but for" the conduct of the government, it is "no bar" to an estoppel "[t]hat a statutory requirement is thereby effectively nullified." Pet. App. 13a. The court concluded that estoppel was warranted in this case.

Judge Mayer dissented. "This decision," he wrote, "contravenes the express mandate of Congress in 5 U.S.C. 8337(d) (Supp. 1988) and Supreme Court precedent." Pet. App. 15a. In his view, the case was controlled by this Court's decisions in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), and *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), because the government agents' negligence here was no worse than in those cases. Pet. App. 15a-18a. In addition, the dissent found estoppel inappropriate because respondent had suffered no "irreparable injury" but rather had demonstrated that his earning capacity was, in fact, "restored." Pet. App. 17a, 19a. Judge Mayer concluded that, while this Court may have left open the question whether the government might be estopped upon a showing of "at least some form of egregious misconduct," "[o]urs is not that kind of case." Pet. App. 18a.

SUMMARY OF ARGUMENT

1. From its earliest days, this Court has consistently held that the government may not be estopped from enforcing the public laws. See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947). This case fits easily within that precedent; the erroneous decision by the court of appeals makes clear, however, the need for this Court to confirm the "no estoppel" rule. That rule is directed both by principles basic to our system of government and by practical considerations affecting the public interest.

a. The government cannot be estopped from enforcing the law because Congress has not waived the sovereign immunity of the United States to the assertion of such a claim. The government has never been subject to estoppel, nor have equitable doctrines ever supplied courts with authority to contravene written and applicable law.

Acting against this legal background, Congress has enacted no law granting courts a general authority to apply estoppel against the government. Nor has Congress consented specifically to the application of estoppel in suits

under 5 U.S.C. 8337 (1988). To the contrary, Congress has limited judicial review of agency action to the issue whether that action is "arbitrary, capricious, an abuse of discretion, or *otherwise* not in accordance with law." 5 U.S.C. 7703(a)(1) and (c) (1988) (emphasis added).

In addition, under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, Congress has specifically excluded recovery of money daamges for tort claims of negligent misrepresentation. Estoppel claims based on misrepresentations of government officials operate in large part as a device to obtain specific relief—often specific monetary relief—for injury occasioned by the same conduct. It is implausible to conclude that Congress, having carefully excluded liability for the tort of misrepresentation, has at the same time exposed the government to substantially the same liability by consenting to the application of estoppel.

b. Estoppel cannot be applied against the government for a further reason: to require that misrepresentations of Executive Branch officials be given the force of law, overriding statutory provisions enacted by Congress, would contravene basic principles of separation of powers. Whatever the nature of the misrepresentation claimed to have caused injury, the remedy sought—implementation of terms that contradict those fashioned by Congress—is beyond the authority of the Executive Branch to execute the law.

For the same reason, it lies beyond the judiciary's authority to order an estoppel. To give the force of law to a misrepresentation of a statute's requirements, a court must read into that statute a "misrepresentation exception"—that the statute will not apply when a party has relied to his or her detriment on a government employee's misinformation concerning the statute's terms. Such a reading arrogates Congress's authority to provide only those exceptions it deems appropriate.

Nor do principles of equity vest courts with general power to override congressional commands. To the contrary, courts of equity " 'can no more disregard statutory * * * requirements and provisions than can courts of law.' " *INS* v. *Pangilinan*, 108 S. Ct. 2210, 2216 (1988).

Separation of powers principles compel the conclusion that only Congress, consistent with the Presentation Clause, can decide when it is appropriate to provide a remedy for misrepresentation by a government official. In fact, Congress has historically performed precisely that task through private legislation. On a number of occasions, Congress has determined to transfer to the courts authority to deal with certain matters formerly dealt with through such legislation. Until and unless Congress confers such authority over claims of estoppel against the government, the courts may not properly entertain them.

c. To estop the government from enforcing the laws would disserve the public interest. A decision to impute the force of law to the words of millions of employees would burden the government with uncontrolled and potentially huge liability. It would fuel litigation characterized by problems of proof, would invite fraud or collusion by government officials, and could result in undesirable restrictions on the amount of information available to the public.

2. The presence of "affirmative misconduct" in making a misrepresentation does not affect the analysis. It does not change the fact that the United States has not consented to the application of estoppel against it, or that it is beyond the authority of the courts to order, and the Executive to implement, noncompliance with the law. Nor does the presence of "affirmative misconduct" bear any necessary correlation to the extent of the individual's injury, or mitigate the harm done to the public interest when the law is not enforced.

Rather, as this Court's cases show, recognition of detrimental reliance is warranted only when, as a result of

official misconduct, subsequent enforcement of a statute is rendered either unconstitutional or unwarranted on the statute's own terms. The question, then, ceases to be one of "estopping" the government from enforcing the law—since the law in such a case either requires that the statute be overridden or directs that the statute not be applied—but rather is one of applying the underlying substantive law. As the issue of estoppel disappears, so too do the sovereign immunity and separation of powers problems that attend it.

Negligent conduct such as that in this case therefore does not warrant the relief awarded by the court below. The negligent actions of government officials do not, in themselves, rise to the level of due process violations. *Daniels* v. *Williams*, 474 U.S. 327 (1986). Nor does this case present any constitutional or statutory problem of fair notice. Citizens are presumed to know the law, and cannot rely on the words of government officials to the contrary. *Merrill*, 332 U.S. at 384-385.

3. Even if this Court determines that the government can be estopped under some standard of affirmative misconduct, no estoppel is warranted here.

Respondent has not made the threshold demonstration that the traditional requirements of estoppel have been met. *Heckler* v. *Community Health Services*, 467 U.S. 51, 59 (1984). Since respondent is charged with knowledge of the law, he could not reasonably rely on the misinformation he was given at the Navy personnel office.

In any case, the conduct of the government employees here was no worse than misconduct that this Court has previously found insufficient to estop the government. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

ARGUMENT

I. THE GOVERNMENT CANNOT BE ESTOPPED FROM ENFORCING THE LAW BY THE MISREPRESENTATIONS OF EXECUTIVE BRANCH OFFICIALS

This Court has repeatedly held that the federal government cannot be equitably estopped from enforcing the public laws. See, *e.g.*, *Filor* v. *United States*, 76 U.S. (9 Wall.) 45, 49 (1869); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *United States* v. *San Francisco*, 310 U.S. 16, 32 (1940); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *INS* v. *Miranda*, 459 U.S. 14 (1982); *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984).[8] Indeed, to our knowledge the Court has never held the government estopped, whether the party seeking an estoppel has relied on a misrepresentation of fact (*Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813)), or of law (*Community Health Services*, *supra*); an oral misrepresentation (*Utah* v. *United States*, 284 U.S. 534 (1932), or a written one (*United States* v. *Stewart*, 311 U.S. 60 (1940)); an offhand remark by a federal employee (*Montana* v. *Kennedy*, 366 U.S. 308 (1961)), or a course of conduct by a federal agency or department (*INS* v. *Hibi*, 414 U.S. 5, 8 (1973)).

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[8] See also *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 369-370 (1813); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 680-681 (1868); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Whiteside* v. *United States*, 93 U.S. 247, 258 (1876); *Hawkins* v. *United States*, 96 U.S. 689, 696-698 (1877); *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190, 210-212 (1896); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber Nat'l Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

These decisions establish, at the very least, that the government cannot be estopped from enforcing the law simply because a government official negligently gives out misinformation about that law—precisely the case here. Indeed, this case is virtually indistinguishable from *Schweiker* v. *Hansen*, 450 U.S. 785 (1981), in which a government official incorrectly informed a claimant that she was ineligible for benefits, and failed to advise her to file a written application. In that case, the Court found nothing in the behavior of the government employee that could raise even a "serious question" whether the government could be estopped from enforcing the law. *Id.* at 790.

Thus, this case—like *Hansen* and the others in which lower court decisions have been reversed—fits squarely within settled precedent. But because the lower courts have misapplied that precedent, we believe it is important to underscore the bases of the principle that, despite hardship in individual cases, the government cannot be "bound [or] estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co.*, 243 U.S. at 409. That precept is, we submit, mandated both by the doctrine of sovereign immunity and by principles of separation of powers. In addition, it is grounded in a sound calculus of the public interest: the citizenry is not well served if its government can be controlled and its treasury raided as a result of the random errors of misinformed employees and officials.

A. Congress has not consented to the application of estoppel against the government

1. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). As a relinquishment of sovereign immunity, congressional consent to be sued cannot be implied but must

be "unequivocally expressed." *Ibid.*; *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981).

A "necessary corollary" of the rule that the United States cannot be sued without congressional consent is that the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto * * * not * * * implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983).[7] The terms of Congress's consent define the extent of the courts' jurisdiction to entertain the suit. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). "[A]ffirmative statutory authority * * * alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940).

2. The necessity of congressional consent to any application of estoppel against the government is underscored by two factors—the general "no estoppel" premise underlying congressional legislation and the nature of estoppel itself.

a. The rule that the government cannot be estopped or similarly bound by the actions of its agents was established in the earliest days of the Republic and has repeatedly been confirmed. See generally, p. 11, *supra*; see, *e.g.*, *Utah Power & Light Co.*, 243 U.S. at 409.[8] As

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[7] See, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156, 160-165 & n.9 (1981) (no right to jury trial inferred from waiver of sovereign immunity where such right does not traditionally apply in actions against the federal government).

[8] Closely related to the rule that the government may not be estopped is the doctrine that laches or neglect of duty by government officials is not a defense to a suit by the government. *Utah Power & Light*, 243 U.S. at 409. That rule was so firmly established by 1821 that Justice Story found the broad language of Section 34 of the Judiciary Act of 1789, ch. 20, 1 Stat. 92, insuffi-

this Court put it in *Merrill*, "the rules of law whereby private [actors] * * * are rendered liable for the acts of their agents are not bodily applicable to a Government agency * * *, unless Congress has so provided." 332 U.S. at 383 n.1.

The premise that the government cannot be estopped from enforcing public law is reinforced by the "well-established" principle that courts of equity can " 'no more disregard statutory and constitutional requirements and provisions than can courts of law.' " *INS* v. *Pangilinan*, 108 S. Ct. at 2216 (quoting *Hedges* v. *Dixon County*, 150 U.S. 182, 192) (1893)); accord 2 J. Pomeroy, *Pomeroy's Equity Jurisprudence* § 425, at 189 (S. Symons 5th ed. 1941); see generally pp. 26-28, *infra*. Since it is "always appropriate to assume that our elected representatives, like other citizens, know the law" (*Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979), Congress must be assumed to be aware of a doctrine that is both long established and basic to the role of government in enforcing written law.

b. The nature of the estoppel doctrine dictates special care in construing the conditions of any consent by Congress to suit. Courts have noted Sir Frederick Pollock's description of the doctrine as "a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence." *Canada and Dominion Sugar Co., Ld.* v.

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cient to waive the immunity of the United States to the binding effect of local statutes of limitations. Section 34 declared:

> [T]hat the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.

United States v. *Hoar*, 26 F. Cas. 329, 329-330 (C.C.D. Mass. 1821) (No. 15,373). See also, *e.g.*, *Dox* v. *Postmaster General of the United States*, 26 U.S. (1 Pet.) 318, 323-326 (1828) (Marshall, C.J.); *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735-737 (1824) (Story, J.).

Canadian Nat. (West Indies) Steamships, Ld., [1947] App. Cas. 46, 55 (H.L. (Can.) 1946). Its "unusual remedial approach" is to protect reliance on a misrepresentation by treating the misrepresentation as true. Shimomura, *Federal Misrepresentation: Protecting the Reliance Interest*, 60 Tulane L. Rev. 596, 613 (1986) [hereinafter *Misrepresentation*]; see generally 3 J. Pomeroy, *supra*, § 813. Given the power, flexibility, and unusual character of the remedy, the burden of establishing that its application is warranted rests with the person who seeks it. See *Community Health Services*, 467 U.S. at 61.[9]

If allowed to operate against the government, the remedy of estoppel would prohibit it from enforcing compliance with law. Estopping the government, like imputing laches to its officers or holding it to local statutes of limitations, thus endangers " 'the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.' " *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938) (quoting *United States* v. *Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373)). As this Court noted in *Community Health Services*, "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." 467 U.S. at 60; see also *Utah Power & Light Co.*, 243 U.S. at 409.

3. a. In light of these considerations, Congress's failure to give general consent to a waiver of the requirements of its laws, as a free-floating remedy for government mis-

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[9] In particular, a party claiming estoppel must show both that it relied on a misrepresentation by an adversary so "as to change [its] position for the worse," and that the reliance so induced was "reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler* v. *Community Health Services*, 467 U.S. 51, 59 (1984); see generally 3 J. Pomeroy, *Pomeroy's Equity Jurisprudence* § 805 (S. Symons ed. 1941).

conduct, is all the more notable. Cf. *Pangilinan*, 108 S. Ct. at 2216.

Certainly, the provisions waiving immunity and establishing the standards of judicial review in this case, 5 U.S.C. 7703(a)(1) and (c) (1988) (see *Lindahl* v. *OPM*, 470 U.S. 768, 793 (1985)), do not so deputize the courts. Section 7703(c)(1) authorizes courts to "hold unlawful and set aside any agency action, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or *otherwise* not in accordance with law" (emphasis added). It cannot be "arbitrary," "capricious," or "an abuse of discretion" to require all individuals equally to meet statutory requirements as written. See *Automobile Club*, 353 U.S. at 185-186 (no abuse of discretion when Commissioner retroactively revoked erroneous tax exemption ruling and applied revocation to all); *Dixon* v. *United States*, 381 U.S. 68, 73-76 (1965) (similar). This is especially true in light of the general policy that knowledge of public law is presumed. *Merrill*, 332 U.S. at 384-385; *Community Health Services*, 467 U.S. at 63.

Nor does the balance of Section 7703(c)(1) provide support for the availability of a remedy such as equitable estoppel. Rather, that provision restricts the scope of judicial review to agency actions, findings, and conclusions which, if not arbitrary, capricious, or an abuse of discretion, are "*otherwise* not in accordance with law" (emphasis added). Short of an explicit denial of authority to estop the government, it is difficult to conceive a waiver of sovereign immunity less hospitable to interpretation as broad consent to so "powerful and flexible [an] instrument" as estoppel.[10]

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[10] Congress clearly knows how to consent to a broader application of remedies. Compare Indian Claims Commission Act, 25 U.S.C. 70a (1976); *United States* v. *Mitchell*, 445 U.S. 535, 540 n.2 (1980) (Section 70a waived sovereign immunity of United States as to claims by Indian parties based on considerations of "fair and honorable dealings that are not recognized by any existing rule of law or equity").

b. The conclusion that Congress has not conferred general authority upon the courts to estop the government is reinforced by the specific exclusion of all negligent misrepresentation claims from the scope of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The FTCA provides that an individual may recover damages from the sovereign for a tort committed by one of its agents. A party seeking to estop the government is, in essence, seeking to obtain a remedy from the sovereign for a tort--misrepresentation—by one of its agents. In fact, the effective operation of estoppel as a remedy for tortious conduct was recognized by one of this country's early authorities on estoppel. See J. Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation* 190-191 (1900) (noting operation of estoppel as "thinly veiled action in deceit"). And the "traditional and commonly understood" legal definition of the tort of "negligent misrepresentation" identified by this Court underscores the similarity: negligent misrepresentation by the government occurs when a party is injured by the "breach of a 'specific duty' owed by the Government to him, *i.e.*, the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs." *United States* v. *Neustadt*, 366 U.S. 696, 706 (1961). See also *Misrepresentation*, at 613-614.

Estoppel differs from a tort claim in that it assumes the existence of the tort by the employee and seeks not damages but specific relief—in this case, respondent's enrollment in the disability annuity plan available under 5 U.S.C. 8337.[11] But it does not follow that,

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[11] Here, the court of appeals remanded the case "to the board with instructions to direct the agency to issue the withheld disability benefits to Mr. Richmond." Pet. App. 14a. There can be little doubt that this order grants specific relief. See *Bowen* v. *Massachusetts*, 108 S. Ct. 2722, 2731-2736 (1988); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)

simply because the government *concedes* the tort of one of its employees, a court has authority to grant a different type of remedy. To the contrary, this Court has recognized that waivers of immunity from damage suits may raise sovereign immunity concerns far less intense than waivers of immunity from suits for specific relief. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-704 (1949).[12]

Since a claim of estoppel is essentially the same, in purpose and effect, as a claim in tort,[13] it is significant that Congress has specifically excluded tort damages for misrepresentation, whether negligent or intentional, from the scope of the FTCA. 28 U.S.C. 2680(h) (1982); *United States* v. *Neustadt*, 366 U.S. 696 (1961). Moreover, the legislative history of that Act indicates that the purpose of the exclusion was to avoid precisely the risks of uncontrolled liability that a policy of estopping the government would raise.[14] Congress's evident concern not to

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(specific relief includes "the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant['s] * * * actions").

[12] For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.

Larson, 337 U.S. at 704.

[13] See, *e.g.*, *Reamer* v. *United States*, 459 F.2d 709 (4th Cir. 1972) (asserting tort, implied contract, and estoppel claims for misrepresentation by government agent).

[14] In the record of the hearings on an earlier version of the FTCA, a Justice Department statement explains Section 2680(h) as "except[ing] from the scope of the act a series of torts as to which, for the time being at least, it may be dangerous for the

expose the government to tort liability for the misrepresentations of its agents makes it even less plausible that Congress has impliedly authorized relief for the same injury via another route, that of estoppel.[15] It is not for the judiciary to second-guess Congress's determination that the protection of sovereign immunity is necessary. *Larson*, 337 U.S. at 705.[16]

Government to subject itself to suit, until in any event considerable experience has been had under the proposed legislation." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 13 (1940). As a representative of the Department testified, "[The provision] proposes to exclude from the cognizance of the law claims arising out of * * * a type of torts which would be difficult to make a defense against, and which are easily exaggranted." *Id.* at 39; see also *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 891 n.448 (1957); Comment, *The Federal Tort Claims Act*, 56 Yale L. J. 534, 547 (1947).

[15] By precluding recovery for the tort of misrepresentation, Congress has shut off a major source of potential liability. Another major source of uncontrolled liability for misrepresentation has been disposed of by the rule that only those with actual authority can bind the government in contract (*i.e.*, that unauthorized statements or conduct cannot "estop" the government from asserting its rights under a contract). See, *e.g.*, *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902). The requirement of authorized action ensures that all contract claims against the government can be resolved by recourse to principles of contract law alone: the government, like other parties, is bound by the words of its authorized contracting officers. See *Larson*, 337 U.S. at 701 n.24; see C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3657, at 291-293 (1985 & Supp. 1989) (noting rationale that implied-in-law contract claims are outside of Claims Court's jurisdiction as breaches of sovereign immunity); see, *e.g.*, *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 129 (1868). The rule that unauthorized conduct cannot contractually bind or "estop" the government—a rule long established by this Court (see note 17, *supra*)—is now confirmed by regulation. See 48 C.F.R. 1.601 (1988).

[16] Nor can an "estoppel" argument be framed by asserting that blameworthy conduct by government officials bars the United States

B. To estop the government from enforcing the laws would violate constitutional principles of separation of powers

1. The practical effect of estopping the government by treating as true the misrepresentations of its agents is to give the words of Executive Branch officials the force of law, even though they are in direct conflict with statutory terms enacted by Congress. Estoppel of the government thus confers *pro tanto* legislative status on government employees, and effectively overrides Congress's mandates. See *Merrill*, 332 U.S. at 383. That result is contrary to the principle—basic to our tripartite system of government—that only Congress may exercise legislative power. *Dixon*, 381 U.S. at 73, 74-75; cf. *Mistretta* v. *United States*, 109 S. Ct. 647, 661-664 (1989). See, *e.g.*, *Automobile Club*, 353 U.S. at 187 (erroneous revenue ruling does not bar collection of taxes mandated by statute); *San Francisco*, 310 U.S. at 31-32 (no estoppel on basis of erroneous administrative interpretation of statute); *Snyder* v. *Buck*, 340 U.S. 15, 19 & n.6 (1950) (no estoppel or alteration by agreement of statutory directives concerning substitution of parties in suit); *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190, 205-210 (1896) (order of Postmaster General in derogation of statute is not bar to recouping overpayments); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 674-682 (1868) (no authority may be exercised by Secretary of War except that delegated by express statutory law or by Constitution).[17]

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from interposing the defense of sovereign immunity: since congressional consent to be sued defines the terms of the courts' jurisdiction, immunity cannot be "waived" by government officials. See, *e.g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940); *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939).

[17] The same principle—that the Executive can act only to implement the law and not to change it—underlies the long-established proposition that the United States cannot be bound in contract by agents acting without actual authority. See, *e.g.*, *Sutton*, 256 U.S. at 578-581; *Pine River Logging Co.*, 186 U.S. at 290-291; *Whiteside*, 93 U.S. at 250, 256-257; *Filor*, 76 U.S. (9 Wall.) at 48; *The Floyd Acceptances*, 74 U.S. (7 Wall.) at 675-683.

As this Court has explained, in a system of government "in which all power is delegated, and is defined by law, constitutional or statutory," the authority of government officers must be found in "one or both of these sources * * * in every instance." *The Floyd Acceptances*, 74 U.S. (7 Wall.) at 676. It cannot otherwise be created, either by usage or by case law. *Id.* at 677-679; see also *Sutton*, 256 U.S. at 579-581.

a. The doctrine applies with special force in cases like this, where the result is to require expenditure of public funds contrary to express congressional mandate. Under the Appropriations Clause,[18] only Congress is vested with power to allocate public monies. "No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them. * * * However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not * * * previously sanctioned [under an appropriation by Congress]." *Reeside* v. *Walker*, 52 U.S. (11 How.) 271, 291 (1850). To impose an estoppel would violate that rule. "[F]unds contributed by all citizens, with definite limitations upon their use," cannot be turned over to a person not within those limitations "simply because the Federal Government has not been able to secure perfect performance from its hundreds of thousands of employees scattered throughout the continent."[19] *Hansen* v. *Harris*, 619 F.2d 942, 954 (2d

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[18] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7.

[19] The government currently employs 3,176,111 civilians; as of 1988, it also employed, 2,247,000 military personnel. See *Federal Civilian Workforce Statistics: Employment and Trends as of July, 1989*, at 6 (OPM 1989); *Statistical Abstracts of the United States* 335 (U.S. Dep't of Commerce 1989).

Cir. 1980) (Friendly, J., dissenting), rev'd *sub nom. Schweiker* v. *Hansen*, 450 U.S. 785 (1981); see *Community Health Services*, 467 U.S. at 63.

That conclusion is especially warranted here. Congress amended Section 8337(d) as part of legislation aimed at reducing federal expenditures. Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 302(a)(1) and (2), 96 Stat. 792; see S. Rep. No. 504, 97th Cong., 2d Sess. 3 (1982). The Senate committee explained the new one-year test for earning capacity in Section 8337(d) as follows:

> Because of the two consecutive year provisions [in the existing earning capacity test], some annuitants can and have manipulated their salary to exceed the 80% level one year and fall below that level the next year. The proposed change to a one year test will make manipulation more difficult, while protecting the interests of disability annuitants who are able to work for short periods or who derive windfall earnings over the short term, but are unable to pursue sustained employment.

S. Rep. No. 504, *supra*, at 228.

The effect of the Federal Circuit's order in this case is thus to require a direct violation of "the conditions defined by Congress for charging the public treasury." *Merrill*, 332 U.S. at 385.

b. The separation of powers concerns posed by estoppel arise not from the specifics of a claimant's injury but from the nature of the remedy sought—an order that the Executive act in violation of the law. Thus, the form of the original misrepresentation is irrelevant. It does not matter whether the misconduct consists of a course of conduct by an agency (see, *e.g.*, *Hibi*, *supra*; *Dixon*, *supra*) or a single default by a government employee (see *Hansen*, *supra*). Nor, as the courts have recognized, does the fact that a misrepresentation occurs in writing affect the analysis. See, *e.g.*, *Automobile Club*, 353 U.S. at 183-184 (no estoppel preventing enforcement

of corrected administrative rulings despite earlier rulings to contrary); *Stewart*, 311 U.S. at 61, 70 (no estoppel despite reasonable reliance on statements contained in circulars and bulletins issued by the Farm Loan Board).[20]

Similarly, it does not matter whether the misrepresentation affects "substantive" or "procedural" requirements (*Hansen*, 450 U.S. at 790), or whether the misrepresentation occurs while an agency is engaged in a business formerly conducted by or in competition with private ventures (*Merrill*, 332 U.S. at 383-384). In each case, the estoppel order requires the Executive to act inconsistently with its obligation to execute the law. The errors of its officials are thus compounded, not resolved, by a judicial requirement that a congressional mandate be further violated.

2. Separation of powers principles are violated not only by the execution of an estoppel but by the action of the courts in ordering it.

a. A court that estops the government from applying a statute in accordance with its terms effectively rewrites that statute to include a "misrepresentation exception." In this case, for example, the Federal Circuit has rewritten Section 8337(d) to add the italicized phrase:

> Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement *unless the annuitant is informed otherwise by a government official or agency and relies to his detriment on such advice.*

This action contravenes basic principles of statutory construction that ensure that Congress alone will legis-

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[20] See also *United States* v. *Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Seime* v. *Bowen*, 822 F.2d 7 (2d Cir. 1987); *Crowe* v. *United States Railroad Retirement Board*, 811 F.2d 1017 (7th Cir. 1987); *Dorl* v. *Commissioner*, 507 F.2d 406 (2d Cir. 1974). Cf. *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813) (government not bound by unauthorized promise of conveyance of land recorded by city commissioners in journal).

late. In fact, Congress recognizes that hardships may be caused by official mistakes or misrepresentations. It knows how to protect individuals who rely to their detriment on such conduct, and on those occasions when it deems such protection necessary, it has written the appropriate "misrepresentation exceptions" into law.

Thus, Congress has specifically identified situations in which it intends good-faith reliance on administrative rules, regulations, interpretations, or similar action to constitute a defense to government enforcement in a judicial or administrative proceeding. See, *e.g.*, 2 U.S.C. 437f(c) and 438(e) (1988) (Federal Election Campaign Act); 15 U.S.C. 57b-4 (1988) (Federal Trade Commission Act); 15 U.S.C. 77s(a) (1982) (Securities Act of 1933); 29 U.S.C. 258-260 (1982) (Portal-to-Portal Act); 29 U.S.C. 1028 (1982) (Employee Retirement Income Security Act); 42 U.S.C. 2000e-12 (1982) (Civil Rights Act of 1964, Tit. VII); 42 U.S.C. 7193(g) (1982) (Department of Energy Organization Act); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 8018, 102 Stat. 3794.[21]

In other cases, Congress has made provision for circumstances that chronically put individuals at risk of

[21] For example, the Portal-to-Portal Act provides:

> [N]o employer shall be subject to any liability or punishment [for violation of the relevant acts] * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [relevant] agency of the United States * * * or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 U.S.C. 259 (1982).

detrimental reliance. For one thing, it has barred government recoupment of overpayments in various situations, if such recoupment would be "against equity and good conscience." See, *e.g.*, 5 U.S.C. 8346(b) (1988) (Civil Service retirement); 38 U.S.C. 3102(a) (1982) (veterans' benefits); 42 U.S.C. 404(b) (1982) (old age, survivors', and disability insurance benefits); 42 U.S.C. 1395gg(c) (1982) (Medicare service payments); 45 U.S.C. 231i(c) (1982) (payments under Railroad Retirement Act of 1974); 45 U.S.C. 352(d) (1982) (Railroad Unemployment Insurance benefits); cf. 42 U.S.C. 1383(b)(1)(B) (Supp. V 1987) (Supplementary Security Income).[22] Calibrating the circumstances, Congress has enacted a number of other, permissively phrased overpayment provisions, conferring discretion on the agency to waive recoupment when "equity and good conscience" so indicate.[23] A very different example is Congress's provision for remission of customs forfeitures given "mitigating circumstances" and on such terms as the administrator deems "reasonable and just." 19 U.S.C. 1618 (1982). By regulation, "mitigating factors" include a "contribu-

[22] Regulations issued pursuant to delegated authority may further specify that agency misconduct or fault, as well as detrimental reliance by an individual on the overpayment, are circumstances that warrant waiver of recoupment as "against equity and good conscience." See, *e.g.*, 5 C.F.R. 831.1402(b) and 5 C.F.R. 831.1403(a)(2) (1988) (Civil Service retirement overpayments); 20 C.F.R. 404.509-404.510 (1988) (old age, survivors', and disability insurance benefits); 38 C.F.R. 1.965(a)(2) and (4) (1988) (veterans' benefits).

The Executive Branch may on its own initiative provide for flexibility in the administrative of its regulations. For example, it may extend filing periods where an employee has not received notice of time requirements. See, *e.g.*, 29 C.F.R. 1613.214(a)(1) and (4) (1988).

[23] See, 5 U.S.C. 4108 (1988) (employee training expenses); 5 U.S.C. 5584 (1988) (employee travel and related expenses); 5 U.S.C. 5922(b)(2) (1988) (overseas cost allowances); 10 U.S.C. 1442, 1453 (1988) (military service retirement); 10 U.S.C. 2774(a) (1988) (military pay and travel expenses); 32 U.S.C. 716 (1982) (same, National Guard).

tory Customs error" such as incorrect advice from a Customs officer. 19 C.F.R. 171 App. A (1988).[24]

In short, Congress has on many occasions expressly recognized that governmental conduct may provoke detrimental reliance. When it regards the risks of such reliance as unacceptably high, Congress has specified the available remedies. Further and different remedies should not be presumed. See, *e.g.*, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974).

b. Nor do principles of equity provide a court with power to "override a 'public policy established by Congress.'" *Pangilinan*, 108 S. Ct. at 2215. Courts of equity cannot disregard statutory and constitutional provisions. To the contrary, "[t]hey are bound by positive provisions of a statute equally with courts of law." 2 J. Pomeroy, *supra*, § 425, at 189; *Pangilinan*, 108 S. Ct. at 2216; p. 14, *supra*.[25] Thus, "[w]herever the rights of the parties are clearly governed by rules of law, courts of equity will follow such legal rules." 2 J. Pomeroy, *supra*, § 425, at 190. In this case, those rules consist of the

[24] See also, *e.g.*, 14 U.S.C. 513 (1988) (allowing Coast Guard retroactive pay and allowances if entitlement delayed in vesting because of administrative error).

Congress may also make allowance for specific instances of governmental mistake or misrepresentation that induce detrimental reliance. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728 (1984); *United States* v. *Realty Co.*, 163 U.S. 427 (1896).

[25] This Court has recognized an analogous concept in the criminal law. In *Sorrells* v. *United States*, 287 U.S. 435, 449-450 (1932), the Court refused, as an arrogation of executive and legislative power, to regard a claim of entrapment as asserting a bar to the prosecution of, or a grant of immunity to, an otherwise guilty individual. The Court concluded instead that the terms of the statute itself reasonably could be read to include a defense of entrapment. That is, under the Court's approach, the issue remained one of whether the statute applied, not one of whether the Executive Branch should be estopped from enforcing an admittedly applicable statute. See also *United States* v. *Russell*, 411 U.S. 423, 428-429, 435 (1973).

entire scheme of compensation created and regulated by the Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*

Estoppel against the government thus poses a dilemma that seldom arises in private litigation. This Court recognized the difference in perhaps its earliest estoppel case when it said that it is one thing to bind an individual "who has himself an interest in the subject-matter of inquiry, who cannot well be mistaken, and whose conduct, therefore, ought to be conclusive on him" (*Lee*, 11 U.S. at 368) and quite another to bind the government to the representations of one of its agents, who, "entrusted with the sales of public lands, or empowered to make contracts for such sales, might, by inadvertence, or incautiously giving information to others, destroy the lien of his principals." *Id.* at 369.[26]

In short, a doctrine that developed as an imperfect but useful remedy in litigation against a private party (see *Misrepresentation*, at 612) is a manifestly ill-suited device when the defendant is a public party charged with enforcing public rights. Although claims of estoppel against the government regularly present the courts with "hard case[s]" that tempt them to resist the clear meaning of a statute or regulation (*Merrill*, 332 U.S. at 386), nothing changes the judicial obligation faithfully to ob-

[26] On occasion, similar dilemmas arise even between private parties. The classic example is that of the warehouseman who certifies to a potential purchaser that he holds the goods for the seller, when in fact he holds them for another. On that authority, the purchaser buys the goods; the warehouseman is estopped from denying that he holds the purchaser's goods, even as he cannot deny that they belong to the true owner. J. Ewart, *An Exposition of the Principles of Estoppel by Misrepresentation* 190 (1900). As Ewart concludes, "[p]lainly [the warehouseman] cannot give them to both; and just as plainly, no court will wittingly order him to do so." In particular, no court will order "specific delivery of goods [to the purchaser] which do not belong to him." *Ibid.* The solution, one unavailable against the government because of the FTCA's misrepresentation exception, is a damage award. *Ibid.*

serve the conditions set by law.[27] "'A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law.'" *Pangilinan*, 108 S. Ct. at 2216.

3. Separation of powers principles compel the conclusion that, unless Congress chooses to delegate such authority to another branch, only it can 'estop the government' from properly implementing statutory terms. In fact, history confirms the structural deduction: Congress has assumed and exercised precisely such authority since its inception. When the government incurs debts of a "moral, equitable or honorable" nature (*United States* v. *Realty Co.*, 163 U.S. 427, 437 (1896)) that are unenforceable in the courts, Congress has used its power to enact private legislation to remedy such injuries. As the Court explained in *Realty*:

> The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. * * * To no other branch of the government than Congress could any application be succesfully made on the part of the owners of such claims or debts for the payment thereof.

Realty, 163 U.S. at 440-441.[28]

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[27] It is likewise clear that a court may not estop the operation of a valid regulation. Congress may either define necessary statutory conditions itself, or it may "legislate[,] * * * as in modern regulatory enactments it so often does, by conferring the rule-making power upon the agency created for carrying out its policy." *Merrill*, 332 U.S. at 384-385. In either case, the resulting rule is an expression of Congress's will. See, *e.g.*, *Community Health Services*, 467 U.S. at 65-66; *Hansen*, 450 U.S. at 790; cf. *Pine River Logging*, 186 U.S. at 291-292.

[28] *Realty* concerned a private bill passed by Congress to aid sugar manufacturers who had come to rely on "sugar bounties" provided by the federal government for the protection of the domestic sugar industry. After unexpectedly repealing the public law providing for such bounties, Congress provided compensation to those manufacturers who, in reliance on that public law, had committed their resources for the year on the assumption of receiving the bounties. (The issue in *Realty* therefore concerned purely a gratuity; the parties did not attempt an estoppel argument. 163 U.S. at 440.)

a. From its inception, Congress has awarded equitable relief by enacting private bills. *Realty*, 163 U.S. at 141. Originally, Congress exercised general control over contract, tort, takings, and other claims against the United States. See Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 La. L. Rev. 625, 637-648 (1985) [hereinafter *History of Claims*]; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 552-558 (1962). By its passage of the Tucker Act, the Federal Tort Claims Act, and various narrower measures, Congress has vested the courts over the years with authority to decide many of these claims. See generally *History of Claims*, *supra*; pp. 33-34, *infra*. But Congress retained its control over claims against the United States that are "founded upon equitable and moral considerations and grounded upon principles of right and justice" (*Realty*, 163 U.S. at 444) and that remained unenforceable in the courts. *History of Claims*, at 653, 664-666, 682, 699 & n.606.

This Court has recognized that Congress's authority over "equitable and moral" claims embraces claims of estoppel. Clarifying the jurisdiction of the newly created Court of Claims in the 1860s, the Court repeatedly rejected estoppel or implied contract arguments (based on the unauthorized acts of government officers), dismissed the cases, and advised the litigants that "[i]f the petitioners are entitled to compensation * * * they must seek it from Congress. The Court of Claims can award them none." *Filor*, 76 U.S. (9 Wall.) at 49; see also *Hawkins* v. *United States*, 96 U.S. 689, 698 (1877); *Gibbons* v.

United States, 75 U.S. (8 Wall.) 269, 275-276 (1868). The claimants in those cases did indeed seek relief in Congress,[29] and other litigants who failed to persuade this Court to estop the government have recognized the remedy on their own initiative.[30]

In 1966, Congress confirmed the importance of its private lawmaking function. Enacting legislation to update its congressional reference authority,[31] Congress noted

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[29] See S. Rep. No. 189, 49th Cong., 1st Sess. 3 (1886) (denying recovery to Filor and his associates as "collusive grantees" of property transferred to them by "a Confederate and an enemy"); Act of Mar. 2, 1881, ch. 113, 21 Stat. 636; S. Rep. No. 854, 46th Cong., 3d Sess. (1881); and H.R. Rep. No. 886, 46th Cong., 2d Sess. 2 (1880) (granting relief to Hawkins because "the officers of the United States were in fault in this matter"); H.R. Rep. No. 673, 43d Cong., 1st Sess. (1874) (denying relief to Gibbons because no duress, no recovery possible for tort charged).

[30] Compare *Wilber Nat'l Bank*, *supra* (no remedy for lapse of insurance coverage despite lack of notice from government), with H.R. 8220, 74th Cong., 1st Sess. (1936) (granting relief), vetoed by President (80 Cong. Rec. 10,560 (1936)); subsequent bill, favorably reported from House, not reported from Senate, see H.R. Rep. No. 34, 76th Cong., 1st Sess. 4 (1939) (noting that, despite Court's conclusion that knowledge of law must be imputed, the "insured did everything in his power to procure, carry, and maintain" his government insurance) (quoting H.R. Rep. No. 1435, 74th Cong., 1st Sess. (1935)).

Compare *Sutton* v. *United States*, 256 U.S. 575, 579 (1921) (no remedy for cost overrun in government contract due to errors by government inspector), with Priv. L. No. 213, ch. 195, 42 Stat. 1784 (1923) (granting relief); see H.R. Rep. No. 1376, 67th Cong., 4th Sess. (1923); and S. Rep. No. 887, 67th Cong., 2d Sess. 1 (1922) ("although legally the contractor was charged with knowledge of the extent of the funds available, * * * the lack of information that the appropriation had been exhausted was entirely excusable"); H.R. Doc. No. 348, 67th Cong., 2d Sess. (1922) (Communication from the President).

[31] The congressional reference authority is designed to facilitate congressional action on private legislation. S. Rep. No. 1643, 89th Cong., 2d Sess. 4-5 (1966). Under that authority, Congress refers proposed legislation to the United States Claims Court for fact-finding sufficient to inform Congress whether the demand is a

that government officials have less flexibility to waive the government's rights under a general statute than private parties have to forgo amounts legally due them, and also observed that courts "have less freedom to adjust their decisions to the equities of particular situations than they do in developing" common law relations between private parties. S. Rep. No. 1643, 89th Cong., 2d Sess. 4-5 (1966). Congress therefore continues to identify a role for private legislation where there is a "need for an equitable exception to the general law, and claims which an agency is simply not authorized to adjust or will not for policy reasons. It is in this area that the sovereign has reserved its right to exercise its conscience with measures for special relief." Staff of House Comm. on the Judiciary, 90th Cong., 2d Sess., *Private Claims Acts and Congressional References* 12 (Comm. Print 1968) (M. Bennett) [hereinafter Bennett]. Under the criteria adopted by the House subcommittee that controls the processing of most private claims, "the subcommittee is guided by principles of equity and justice. [Its task] * * * is to determine whether the equities and circumstances of a case create a moral obligation on the part of the Government to extend relief to an individual." *Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 1st Sess., *Supplemental Rules of Procedure for Private Claims Bills* 2 (1989).[32]

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legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States." 28 U.S.C. 1492, 2509(c) (1982).

[32] A study conducted in 1966 determined that, aside from immigration bills, private legislation provided relief that fell into certain general categories, including waivers of the obligation to return government overpayments and waivers of various statutes of limitations. Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684, 1693-1697 (1966). In many categories, government fault was an important factor in the award of private relief. *Ibid.* See also Gellhorn & Lauer, *Congressional Settlement of Tort Claims*

b. Although it has chosen to restrict its consideration of certain types of claims,[33] Congress continues annually to pass bills granting private relief to those who have relied to their detriment on misrepresentations by government employees. For example, Congress in 1986 waived the statutory deadline under 5 U.S.C. 8337(d) in the case of a petitioner who failed timely to apply because he relied on erroneous information given him by a federal personnel officer. Priv. L. No. 99-3 (June 19, 1986), see 131 Cong. Rec. 9675 (1985) (remarks of Sen. Helms).[34]

Against the United States, 55 Colum. L. Rev. 1, 14 (1955); Glosser, *Congressional Reference Cases in the United States Court of Claims: A Historical and Current Perspective*, 25 Am. U. L. Rev. 595, 617-623 (1976) (congressional reference case criteria). Commentators have noted that the procedures used by Congress are fair and quite reliably free from partisan influence. See Note, *Private Bills*, *supra*, at 1703; Gellhorn & Lauer, *supra*, at 4, 36.

[33] The House subcommittee states that it will not consider claims of eligibility under a number of acts when those claims have been considered "on [their] merits" (*Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 1st Sess., *Supplemental Rules of Procedure for Private Claims Bills* 5, 9 (1989) [hereinafter *Rules*] (the Longshore and Harbor Workers Compensation Act, the Federal Employee Compensation Act, the Railroad Retirement Act, and the Social Security Act)), although it will intervene to waive the statutes of limitations (Rules 8, 14, 15) for the latter three acts. The subcommittee generally declines to hear claims for Civil Service retirement benefits (Chapter 83 of Title 5), and analogous military benefits (Rule 9) because such action would "interfer[e] with the general provisions of such laws by conferring a special benefit or privilege on a claimant." *Rules*, at 7. Nonetheless, Congress continues to grant relief, construing exceptions to these categories as necessary (as the bills cited below indicate).

[34] For similar instances, see, *e.g.*, Priv. L. No. 100-37 (Nov. 9, 1988), and H.R. Rep. No. 291, 100th Cong., 1st Sess. (1987) (awarding interest lost as result of joining wrong retirement plan because of erroneous advice); Priv. L. No. 100-33 (Nov. 3, 1988), and H.R. Rep. No. 290, 100th Cong., 1st Sess. (1987) (waiving recoupment of overpayment that induced retirement); Priv. L. No. 100-25 (Oct. 28, 1988), and H.R. Rep. No. 148, 100th Cong., 1st Sess. (1987) (where lack of waiver based on erroneous advice, deeming military retirement pay to have been waived so that calculation of survivor annuity could include military service); Priv. L. No. 99-14 (Sept. 23, 1986), and H.R. Rep. No. 78, 99th Cong., 1st Sess. (1985) (same).

A number of bills appear to grant moving, travel, or other expenses incurred in reliance on erroneous official advice. See, *e.g.*, Priv. L. No. 100-47 (Nov. 10, 1988), and H.R. Rep. No. 443, 100th Cong., 1st Sess. (1987) (moving expenses); Priv. L. No. 100-26 (Oct. 28, 1988), and H.R. Rep. No. 545, 100th Cong., 2d Sess. (1988) (subsistence expenses).

Should Congress determine that its private bill mechanism is an insufficient response to the "estoppel" claims of citizens, it knows full well how to respond. Congress has repeatedly waived sovereign immunity and defined the terms of that waiver when it felt compelled by its workload or the nature of its task to refer certain categories of claims to the courts. Just such a purpose stimulated the creation of the former Court of Claims and the vesting of jurisdiction in that court to award final judgments (*Glidden*, 370 U.S. at 552-554; Bennett, *supra*, at 5; the passage of the Tucker Act, ch. 359, § 1, 24 Stat. 505, to expand the jurisdiction of the Court of Claims to hear contract, takings, and other claims (*Glidden*, 370 U.S. at 556-557; *History of Claims*, at 664-665); the enactment of the FTCA, ch. 753, 60 Stat. 842 (S. Rep. No. 1400, 79th Cong., 2d Sess. 7 (1946); *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953)); the confirmation and refinement of the congressional reference authority (S. Rep. No. 1643, *supra*, at 4-5);[35] the passage of the Quiet Title Act, Pub. L. No. 92-562, 86 Stat. 1176,

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[35] Congress's retention of its reference authority has particular relevance, since the purpose of such references is to aid Congress in disposing of private legislation. As the Claims Court recently noted in response to a government objection that the court could not recommend relief to a contractor who had relied on unauthorized representations in a contract dispute, "[this] reasoning is nothing less than an expression of dissatisfaction by counsel with the Congressional Reference system itself." *Merchants Nat'l Bank* v. *United States*, 5 Cl. Ct. 180, 208 (1984). Rather, the court considered

in 1972 (*Block*, 461 U.S. at 280-281); and numerous other delegations, including nonjudicial devices, for dealing with its workload.[36]

We are not unmindful that private legislation is a "clumsy, time-consuming * * * procedure" (*INS* v. *Chadha*, 462 U.S. 919, 954 (1983)), and that Congress has chosen to limit its availability in practice (see note 33, *supra*). But whatever its infirmities, it remains the structural recourse for those wishing to estop the government from enforcing the law. Any arguments for change are "appropriately addressed to Congress" (*Dixon*, 381 U.S. at 80), not this Court.

C. The application of estoppel against the government would not be in the public interest

The "unusual remedial approach" of estoppel against the federal government would direct that, notwithstanding provisions of law to the contrary, the errors of individual officers be made controlling. Such a regime would undermine the ability of the Executive to fulfill its constitutional responsibility faithfully to execute the duties assigned it by Congress.

If estoppel were permitted, the government would be exposed to enormous potential liability. It is simply impossible for the federal government to exercise complete control over every one of its millions of employees and agents. Despite good-faith efforts to avoid mistakes, the

itself obligated to identify the "equitable" grounds that may exist for relief when "the Government would be legally liable *but for one or more extrameritorious defenses that accrue to it by virtue of its sovereign status.*" *Id.* at 209 n.29 (quoting *Burt* v. *United States*, 199 Ct. Cl. 897, 906 (1972)).

[36] Perhaps the best-known of these is Congress's delegation of authority to the Attorney General (originally subject to its legislative veto) to allow deportable aliens to remain in this country in certain specified circumstances. See *INS* v. *Chadha*, 462 U.S. 919, 954-955 (1983); see generally Note, *Private Bills and the Immigration Law*, 69 Harv. L. Rev. 1083 (1956).

government obviously cannot eliminate all instances of erroneous advice on which a private party relies. Indeed, over 150 years ago, when there were only a fraction of the present number of government employees, Justice Story observed that the government's "fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses" if equitable doctrines applicable in private suits were to govern. *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824); see also *Lee*, 11 U.S. (7 Cranch) at 369-370; *The Floyd Acceptances*, 74 U.S. (7 Wall.) at 681. And as this Court recognized in *Hansen*, the losses would not be solely financial; the benefits that statutory or regulatory requirements are meant to ensure (in *Hansen*, for example, the submission of a written application) would be lost as well. 450 U.S. at 789-790.

Litigation generated by the availability of estoppel could itself seriously burden government operations. As in this case, individuals could claim that duly enacted laws defining conditions of eligibility for government benefits did not apply to them because they had solicited and received, or simply taken home with them from government offices, circulars that turned out to contain out-of-date information. Compare, *e.g.*, *Stewart*, 311 U.S. at 70 n.22 ("casual statement" of Secretary of Treasury at congressional hearing); *Utah* v. *United States*, 284 U.S. 534, 545 (1932) (statements made by Special Assistant Attorney General while delivering complaint). The government would then be put on the defensive in each lawsuit, struggling with difficult problems of proof, and putting at risk in each instance the federal fisc.

In addition, a rule allowing estoppel against the government would present an invitation to fraud. That misfortune has long been avoided. In what was probably its first response to a claim of estoppel against the government, this Court declared it better "that an individual should now and then suffer by * * * mistakes [of gov-

ernment officials], than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself." *Lee*, 11 U.S. (7 Cranch) at 370. Accord *Whiteside* v. *United States*, 93 U.S. 247, 257 (1876); see, *e.g.*, *Pine River Logging*, 186 U.S. at 290-291.

At the end of the day, the principal effect of a rule permitting estoppel might well be that the government would give far less advice and make available fewer government publications. Cf. *Hansen*, 450 U.S. at 790-791 & n.5; *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979). That result is unnecessary; the government, like its citizens, is "a loser by the negligence of its officers" (*Hart*, 95 U.S. at 318), and has ample incentive to ensure that dissemination of information is accomplished as carefully and accurately as possible.

We recognize, as has this Court, that the "no estoppel" rule can result in "phases of hardship" to individuals. *Merrill*, 332 U.S. at 383; see, *e.g.*, *Whiteside*, 93 U.S. at 257; accord *Lee*, 11 U.S. (7 Cranch) at 370. But it is beyond the power either of the Executive or this Court to cure that problem. The Court should now make explicit what has been more than implicit in a long line of its decisions—arguments in favor of compensating those who rely on erroneous information supplied by government officials must be addressed to Congress.[37]

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[37] In strong confirmation that it is the appropriate forum for those seeking protection from the damage caused by governmental misrepresentations, Congress recently responded to the type of harm chronicled in *Hansen*. The Omnibus Budget Reconciliation Act of 1989 includes a section providing that, when an individual fails to apply for benefits because of misinformation provided by the agency, the individual will be deemed to have applied on the date the incorrect information was provided. See H.R. 3299, 101st Cong., 1st Sess. § 10302 (1989).

II. THE PRESENCE OF "AFFIRMATIVE MISCONDUCT" DOES NOT AFFECT THIS ANALYSIS

This Court has left open the question whether some type of "affirmative misconduct" by government agents may at times justify estoppel. *Community Health Services*, 467 U.S. at 60-61; *Miranda*, 459 U.S. at 17-18; *Hansen*, 450 U.S. at 788; *Hibi*, 414 U.S. at 8-9; *Montana*, 366 U.S. at 314-315.

"Misconduct," however, is already a precondition of an estoppel. There must be "conduct—acts, language, or silence—amounting to a representation or concealment of material facts," although not necessarily amounting to fraud. 3 J. Pomeroy, *supra*, § 805, at 191, 192-194. As we show below, there is no correlation between "misconduct" in any particular case and the need for or justifiability of estopping the government. Rather, this Court has rightly held that the misrepresentations of government officials are relevant only insofar as they make enforcement of a statute, as written, inconsistent with the constitutional demands of due process or because they operate to deprive a person of the fair notice required by the statute itself. In such circumstances, the issue is no longer one of "estoppel"; government "nonenforcement" is compelled by constitutional command or because the statute by its terms has been rendered inapplicable.

A. The presence of egregious misconduct, in and of itself, does not direct the application of estoppel as a remedy

The degree of official misconduct has no impact on whether the United States has waived its sovereign immunity, since effecting such a waiver is not within the power of Executive officers. See, *e.g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940).

Moreover, the degree of misconduct does not alter the fact that it is beyond the Executive's authority to give

effect to the errors or misconduct of its employees in violation of laws written by Congress, and beyond the authority of the courts to order that result. Estoppel of the government undermines these principles, whether a government employee's actions are merely negligent or rise to some unspecified higher level of fault. It would, in fact, be all the more inconsistent with the underpinnings of the general rule against estoppel for courts to hold that agencies are bound by the actions of their representatives in those situations—and only those situations—in which there can be no doubt that responsible agency officials did not approve and would not approve of their representatives' actions.

Finally, the degree of misconduct by a government agent does not affect the damage done to the public interest when the law is not enforced, nor even correlate reliably with the degree of harm caused by the employee's behavior. See Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws"*, 64 Tex. L. Rev. 1, 42-43 (1985); Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 559-560 (1979). Because the concept of "affirmative misconduct" is flexible enough to encompass a wide variety of actions, it may simply provide discretion for courts to redress harms done in particular cases, without regard to the broader harm to to the public interest that such redress would bring in its wake.

Since an "affirmative misconduct" exception cannot be squared with the doctrinal and policy bases of the "no estoppel" rule, it is not surprising that the lower courts have generated many conflicting, and regularly revised, definitions of the phrase. See Pet. 21-22. In our view, the confusion is inherent in the very concept of an "exception" to the doctrinal mandates that prohibit estoppel of the government. Rather, government action can be affected by its employees' misrepresentations only in narrow circumstances.

B. The misconduct of government officials is relevant only when that misconduct would render subsequent enforcement of a statute unconstitutional or inapplicable by its own terms

Recognition of detrimental reliance is warranted only when, as a result of official misconduct, subsequent enforcement of a statute is rendered unconstitutional or inapplicable on the statute's own terms. Such recognition —which is derived from the underlying substantive doctrines, not estoppel principles—is compatible with this Court's precedents and is capable of coherent and predictable application.

1. This Court has recognized and made allowance for some forms of detrimental reliance induced by "governmental deception." *Community Health Services*, 467 U.S. at 60 n.12 (citing *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973) (*PICCO*)); and *Moser* v. *United States*, 341 U.S. 41 (1951)). Thus, in certain cases involving the application of the criminal laws or of especially draconian civil sanctions, misrepresentation by government officials has been held to deprive the individuals concerned of the fair notice required by the Due Process Clause or by the terms of the relevant statute.

In *PICCO*, for example, the Court ruled that a defendant could not be criminally convicted for violating Section 13 of the Rivers and Harbors Act without an opportunity first to establish the defense that, as a result of a long-standing administrative interpretation of Section 13, it had been "affirmatively misled" into believing that its conduct was not criminal. The Court explicitly identified the argument as analogous to those sustained in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), and *Raley* v. *Ohio*, 360 U.S. 423 (1959). *PICCO*, 411 U.S. at 674. In *Cox* and *Raley*, criminal convictions based on conduct that government officials had effectively assured the defendants was noncriminal were held by this Court to violate the requirements of due process, because the defendants had been denied "fair warning" of the criminality of that

conduct. See *Raley*, 360 U.S. at 437-439; *Cox*, 379 U.S. at 571 (following *Raley*). The Court in *PICCO*, employing implicit if not explicit due process reasoning, similarly determined that the defendant had to be afforded the opportunity to demonstrate that the unique circumstances of the case deprived it of fair warning. 411 U.S. at 674.

The central issue in *Moser* was whether a Swiss national had waived his rights to American citizenship. According to the applicable statute, a resident alien could claim exemption from American military service, but would thereafter be debarred from seeking American citizenship. However, in the apparent belief that an American-Swiss treaty provided an exception for Swiss nationals, the American government literally excised the express waiver provision printed on other exemption applications from the applications for Swiss nationals. Moser signed one such application. In light of these circumstances, the Court found that Moser did not execute the knowing and intentional waiver of citizenship required by elemental fairness. 341 U.S. at 47. The Court thus appeared to interpret the pertinent statute as requiring "an intelligent election" to claim or refrain from claiming an exemption, for it explicitly found "no need to evaluate the[] circumstances on the basis of any estoppel of the Government." *Ibid.* (That reading, in fact, would appear to be necessary if *Moser* is to continue to be good law after *Pangilinan*, *supra*.[38])

[38] To the extent it goes farther, *Moser* appears to adopt due process reasoning. The Court thus cites (341 U.S. at 47) *Johnson* v. *United States*, 318 U.S. 189, 197 (1943), a case that presaged *Raley* v. *Ohio*, 360 U.S. 423 (1959), and turned on very similar facts. In *Raley*, the Court found that the Due Process Clause invalidated a conviction based on refusal to answer questions at a legislative hearing, where the refusal was induced by the Commission's erroneous representation that the witnesses could rely on the state privilege against self-incrimination. (Actually, state law removed the privilege in exchange for legislative immunity.) The Court concluded that to uphold the convictions would be to sanction "the most indefensible sort of entrapment by the State." 360 U.S. at 438. In *Johnson*, the Court held that a defendant could be "entrapped" if a court assured him of his right to withhold his testimony because of the privilege against self-incrimination but then allowed the prosecutor to comment on the defendant's silence. *Johnson* did not speak in due process terms; the Court, rather, determined the case to be inconsistent even with its supervisory authority over the district courts. But the Court has made clear that *Johnson* raised concerns similar to *Raley*. See *Doyle* v. *Ohio*, 426 U.S. 610, 618 n.9 (1976). Finally, in *Moser*, the Court concluded that to rule other than it did "would be to entrap petitioner." 341 U.S. at 47.

In fact, the notion that the government might be subject to estoppel in some instances appears to have arisen in the "citizenship" context. This Court seems first to have raised the possibility in *Montana v. Kennedy*, 366 U.S. 308, 315 n.11 (1961), citing two courts of appeals decisions, *Podea v. Acheson*, 179 F.2d 306 (2d Cir. 1950), and *Lee You Fee* v. *Dulles*, 236 F.2d 885, 887 (7th Cir. 1956), rev'd, 355 U.S. 61 (1957). But neither *Podea* nor *Lee You Fee* was an estoppel decision. In *Podea*, the court found that actions by American officials had *compelled* a native-born American citizen to serve in a foreign army—service that was later claimed to deprive him of American citizenship; thus, there was no voluntary expatriation. 179 F.2d at 309. And *Lee You Fee* contained only dictum that where American officials actually *prevented* individuals' travel to the United States (travel necessary for the preservation of their citizenship) by failing to issue travel orders, the government could not then deprive those individuals of citizenship. Both cases fit easily within the *Moser* rationale that a right to citizenship could not be involuntarily forfeited under applicable statutes.

When official misconduct does not either render subsequent enforcement of a statute unconstitutional or render the controlling statute inapplicable by its own terms, this Court has held that highly blameworthy behavior—even that which amounts to "an affirmative undertaking to raise or surrender a public right" (*Stewart*, 311 U.S. at 70)—is not sufficient to justify estopping the government.

See, *e.g.*, *Hibi*, 414 U.S. at 8-9 (no estoppel where government failed fully to publicize rights under statute and to station authorized naturalization representative in the Philippines); *Miranda*, 459 U.S. at 19 (no estoppel where INS failed to act on visa petition for 18-month period); *Automobile Club*, 353 U.S. at 183-184 (no estoppel where IRS Commissioner, who had made erroneous ruling, sought to apply corrected ruling retroactively); *Merrill*, *supra* (no estoppel where government agent erroneously advised farmers that their crop was insurable and aided their application to government); *Stewart*, *supra* (no estoppel despite publication of misleading statements in circulars and bulletins of Farm Loan Board); *San Francisco*, 310 U.S. at 31-32 (no estoppel where government sought to enforce provisions of Raker Act in manner contrary to earlier administrative rulings by Interior Department); *Pine River Logging*, 186 U.S. at 290-291 (no estoppel where government agents knew of and supervised cutting of timber in excess of contract).

2. Recognition of detrimental reliance in the limited situations presented by cases like *PICCO* and *Moser* raises none of the doctrinal problems that inhere in the concept of estoppel. A waiver of sovereign immunity for review of action "otherwise not in accordance with law" necessarily includes consent to review of actions that violate the Constitution, or the terms of a statute. Moreover, the suggested approach raises no separation of powers concerns. If application of a statute would violate a constitutional right, a court is, of course, justified in refusing so to apply it. And, if circumstances rendered the statutory terms themselves inapplicable, judicial determination of that fact would be a traditional exercise of the courts' proper authority.

3. Such limited recognition of detrimental reliance has been, and is, capable of ready and coherent application. The conduct at issue is tied to the harm caused, providing protection when protection is constitutionally or legally essential. By contrast, to allow estoppel on the basis of some vague standard of "affirmative misconduct" would only perpetuate the current state of confusion.

C. The negligent conduct that occurred in this case does not affect either constitutional or statutory rights

Due process is "simply not implicated" by the negligent actions of government officials. *Daniels* v. *Williams*, 474 U.S. 327, 328 (1986). The "lack of due care" that characterizes negligent acts, while blameworthy in tort, does not represent the "abuse of power" (*id.* at 332) or its use as "an instrument of oppression" (*Davidson* v. *Cannon*, 474 U.S. 344, 348 (1986)) against which the Due Process Clause was meant to guard. Without more, therefore, the negligent misrepresentation of a government official cannot affect the application of a statute.

Nor are constitutional or statutory problems of fair warning generally raised by Executive errors. "Every citizen of the United States is supposed to know the law." *The Floyd Acceptances*, 74 U.S. (7 Wall.) at 682. See, *e.g.*, *Community Health Services*, 467 U.S. at 63; *Merrill*, 332 U.S. at 384-385; *Wilber Nat'l Bank*, 294 U.S. at 123-124; *Sutton*, 256 U.S. at 579; *Hart*, 95 U.S. at 318; *Whiteside*, 93 U.S. at 257. Those who deal with the government, therefore, may not rely on the conduct of government agents contrary to law. *Community Health Services*, 467 U.S. at 63; *Merrill*, 322 U.S. at 384. Indeed, the whole point of publishing the law, from the codification of statutes to the presentment of rules and regulations in the Federal Register (see 44 U.S.C. 1507 (1982)), is to give the people an authoritative source for the laws that regulate their society. On that premise, civil and criminal law enforcement depends. And the occasions when such notice does not suffice are rare. See, *e.g.*, *PICCO*, *supra*. Nothing in this case supports such an exception here.

III. EVEN IF THE GOVERNMENT MAY BE ESTOPPED UNDER SOME STANDARD OF AFFIRMATIVE MISCONDUCT, NO ESTOPPEL IS WARRANTED HERE

A. Since respondent is charged with knowledge of the law, his reliance on erroneous advice was not reasonable

In *Community Health Services*, this Court held that "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." 467 U.S. at 61. Thus, the party claiming an estoppel must show that it relied to its detriment on its adversary's conduct, and that such reliance was reasonable in that the party claiming the estoppel "did not know nor should it have known that its adversary's conduct was misleading." *Id.* at 59.[39]

Any reliance by respondent on the erroneous advice he received in this case was not reasonable. Indeed, this Court made clear in *Community Health Services* that reliance on the words of a government employee that contradict the terms of a published statute or regulation can never be "reasonable": "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Community Health Services*, 467 U.S. at 62. In particular, "[p]rotection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law." *Ibid.* Respondent and others are on notice of the administrative regulations controlling

[39] Indeed, even between private parties, estoppel cannot be applied "[i]f, at the time when he acted, [the party seeking estoppel] * * * had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant." 3 J. Pomeroy, *supra*, § 805, at 192 (quoted in *Community Health Services*, 467 U.S. at 59 n.10).

the funds they seek. See *Merrill*, 332 U.S. at 384-385; *Community Health Services*, 467 U.S. at 63. *A fortiori*, such persons are "charged with knowledge of the United States Statutes at Large." *Merrill*, 332 U.S. at 384.

Nor does the fact that a government official furnished respondent a government circular containing out-of-date information affect his duty "to know the law." Although this Court in *Community Health Services* pointed to the oral nature of the advice given there as a factor in its analysis of the reliance element (see 467 U.S. at 65), it did not suggest that reliance is reasonable whenever advice is in writing. Indeed, this Court and the lower federal courts have regularly declined to estop the government despite the fact that some misrepresentation was committed to paper. See pp. 22-23 and note 20, *supra*. By abandoning this precedent, the court below has conferred estoppel claims on any number of individuals who may have picked up or negligently been given circulars containing out-of-date information.[40]

[40] The Federal Circuit's broad finding of reasonable reliance also conflicts with the decisions of a number of other circuits. The Seventh Circuit, for example, has held that, except in narrow circumstances not relevant here (see, *e.g.*, *Portmann* v. *United States*, 674 F.2d 1155, 1167 (1982)), a party claiming a misrepresentation by a government official is "charged with knowledge of the law" and thus cannot demonstrate the reliance traditionally required to support estoppel. See *In re Larson*, 862 F.2d 112, 114-115 (1988); *Crown* v. *United States Railroad Retirement Board*, 811 F.2d 1017, 1020-1021 (1987). Similarly, the First Circuit has recognized that after *Community Health Services*, individuals are "properly charged with knowledge of the requirements [of law]." *Falcone* v. *Pierce*, 864 F.2d 226, 230-231 (1988). The Tenth Circuit has held that a party relying on an erroneous interpretation of a regulation by an administrative agency "assume[s] the risk" that the interpretation is erroneous. See *Emery Mining Corp.* v. *Secretary of Labor*, 744 F.2d 1411, 1416 (1984); *United States* v. *Browning*, 630 F.2d 694, 702-703 (1980). The D.C. Circuit has agreed. *Boulez* v. *Commissioner*, 810 F.2d 209, 218 n.68, cert. denied, 484 U.S. 896 (1987).

B. There was no such affirmative misconduct here as would suffice to estop the government

Should this Court decide that the estoppel doctrine warrants an exception based on some standard of affirmative misconduct, such an exception would not in any event apply here. The misrepresentations made by the Navy employees in this case cannot be distinguished from the behavior of other government agents that the Court has found to fall "far short" of affirmative misconduct. *Hansen*, 450 U.S. at 790 (quoting *Montana*, 366 U.S. at 314).

In *Schweiker* v. *Hansen*, a Social Security Administration claims representative incorrectly informed a claimant that she could not qualify for benefits and failed, contrary to the agency's claims manual, to recommend that she file a written application. 450 U.S. at 786. Because a written application was required under agency regulations (*id.* at 790), the claimant lost her entitlement to approximately 12 months of benefits for which she was otherwise eligible. In *Montana* v. *Kennedy*, an American consular official erroneously advised the petitioner's mother that she could not travel to the United States because she was pregnant. Consequently, the petitioner was born abroad and could not claim American citizenship by birth. In these cases, as in a number of others (see cases reviewed above, pp. 41-42, *supra*), the Court rejected a claim of estoppel on the basis of conduct of government agents at least as careless and far more damaging than that involved here.

The court of appeals sought to distinguish this case on the ground that one of the government agents gave the respondent *written* misinformation. See Pet. App. 4a, 10a-11a. Although written information may induce greater reliance than oral information (*Community Health Services*, 467 U.S. at 65), this Court has never suggested that an Executive agent, in a country and a government "that work[] overwhelmingly by paper" (Raven-Hansen, *supra*, at 55), commits "affirmative misconduct" whenever he or she negligently passes on misinformation

in writing. To the contrary, the Court has made clear that any concept of "affirmative misconduct" requires more egregious behavior. The employees here, like the claims representative in *Hansen*, negligently provided outdated information; they did not deliberately mislead the respondent, make false promises, or otherwise defraud him. See 450 U.S. at 790 (quoting *Montana*, 366 U.S. at 314); cf. *Schime* v. *Bowen*, 822 F.2d 7, 9 (2d Cir. 1987) (case in which erroneous advice about eligibility for benefits was conveyed in writing is indistinguishable from *Hansen*). There was, in short, nothing approaching "affirmative misconduct" in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Attachment 4 to FPM Letter 831-64

OFFICE OF PERSONNEL MANAGEMENT

INFORMATION TO APPLICANTS FOR DISABILITY RETIREMENT

Your agency's review of your employment records shows that you are eligible for regular voluntary retirement. We want to be sure that you know the advantages and disadvantages of a disability retirement, which are discussed below.

1. *Amount of Annuity*: For you the dollar amount of your retirement annuity will be the same whether you retire on a disability annuity or whether you retire voluntarily based on your age and service. The guaranteed minimum disability annuity provision in the retirement law does not benefit an employee who has approximately 27 years of Federal service or who is age 60 or older.

2. *Taxes*: You may not be aware that there have been changes in the Internal Revenue Code. These changes, to a large extent, do away with the tax advantage that civil service disability retirees formerly received. Under current law there is no tax benefit unless the taxpayer is totally disabled for *all* gainful employment. Since our decision on your application must be based only on whether you are disabled for your current position, or a vacant position of equal grade or pay, a finding of disability by the Office of Personnel Management does not meet the Internal Revenue Service's requirement. If your application is based on the belief that civil service disability retirement will result in a tax advantage, we suggest that you check with your local Internal Revenue Office for current tax information.

3. *Other Benefits*: Other benefits, such as paid-up commercial life insurance policies, which may result from a finding of total disability, are often tied to the Social Security definition of disability. Here again, if your disability application is based on the belief that its approval will result in some other benefit, we suggest that you check with the appropriate source to find out whether a finding of disability for civil service retirement will meet the criteria.

4. *Sick Leave*: Whether you apply for disability retirement or voluntary retirement because of disability, you may choose either to use all (or part) of your sick leave prior to separation, if eligible—or to have the sick leave used to extend your length of service in the annuity computation. Approval for use of sick leave is not automatically granted upon submission of an application for either type of retirement. A request for approval of sick leave must be made to your agency, and you must provide them with such evidence of your incapacitation (usually a detailed medical certification) as they may require. Even if sick leave is approved, your agency may periodically request additional evidence of continued incapacitation, particularly during the period of sick leave prior to voluntary retirement because of disability or prior to the approval of disability retirement.

5. *Disability Requirements*: Unless the Office of Personnel Management determines that your disability is permanent, you must undergo annual examinations until you reach age 60. Also, every disability annuitant who is under 60 years of age must report his/her annual income from wages or self-employment in such detail as the Office of Personnel Management may require. When, in each of two consecutive years, your income from wages or self-employment equals at least 80 percent of the current rate of pay for the position from which you retired, your earning capacity is deemed restored and your disability annuity is stopped.

If your disability retirement annuity benefit is stopped due to either a recovery from the disabling condition that established your entitlement to a disability benefit or restoration to earning capacity, you will be eligible for a retirement benefit based on age and service. This benefit would begin no sooner than the day after your disability annuity stopped but it would not include the cost of living increases that were applied to the disability annuity.

6. *Processing Delays*: Applications for disability retirement take longer to process than voluntary retirements. In many cases, there is not enough medical or other information in the file, when it comes up for review by a staff medical officer, to reach a decision. This means that we must go back to the employee, or the doctor for additional medical evidence. In some cases it is even necessary to offer the employee a medical examination by a doctor designated by our Medical Division. The doctor designated specializes in the disease or inquiry claimed by the employee. Quite often, too, we have to contact the employee's agency to secure information about the quality of the employee's performance in the position occupied. Naturally, this means that an employee who has used all of the leave to his or her credit may be without money before a final decision can be made on the disability claim.

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